IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 281 OF 2002

Shri Mahabaleshwar Fadte,
G-4, Ratnadeep Building,
Building "B", Curti,
Ponda, Goa. ..... Petitioner.

V/s.

1. Baburao Tukaram Mangale,
Shapur, Ponda, Goa.

2. M/s. Ratnadeep Builders,
represented by its Sole Proprietor,
Madhav Narain Naik Kundaikar,
House No.295, Dasalwada,
Kundaim, Ponda, Goa. ..... Respondents.

Mr. R. V. Kamat, Advocate for the petitioner.

Mr. Valmiki Menezes, Advocate for respondent No.1.

Mr. P. A. Kholkar, Advocate for respondent No.2.

CORAM : R.M.S. KHANDEPARKAR, J.

DATE : SEPTEMBER 7, 2006.

ORAL JUDGMENT :

Heard. The petitioner challenges orders dated 30.12.2000 and 19.8.2002 passed in Civil Misc. Application No.142/94/A and Special Civil Suit No.28/1994/A respectively by the Civil Judge, Sr. Division, Ponda, being in contravention of the provisions of law comprised under Order XXXIX, Rule 2A of C.P.C. The contention on behalf of the petitioner is that the property which is subject-matter of

the suit for specific performance cannot be attached in a proceeding under Order XXXIX, Rule 2A of C.P.C.

2. A few facts relevant for the decision are that respondent No.1 has file Special Civil Suit No.28/94 on 9.3.1994 in the Court of Civil Judge, Sr. Division, Ponda for specific performance of an Agreement dated 17.7.1992 stated to have been entered into with the respondent No.2, accompanied by an application for temporary injunction to restrain the respondent No.2 from entering into any transaction or transferring possession of a Flat No.G-4 situate on the Ground Floor of the building at Curti Ponda, Goa. By an Order passed on very day i.e. on 9.3.1994, in Civil Misc. Application No.47/94, the trial Court restrained the respondent No.2 from entering into any transaction or transferring possession and title of the said flat, pending the disposal of the suit. By an application dated 6.7.1994, the respondent No.1 applied to the Court to invoke powers under Rule 2A of Order XXXIX of C.P.C. against the respondent No.2 and the petitioner, on the ground of disobedience of the Order dated 9.3.1994 as the petitioner was inducted in the said flat by creating interest in his favour by the respondent No.2 subsequent to the said order. Simultaneously, another application was filed for directions to the petitioner to vacate and to the respondent No.2 to get vacated the suit flat and to keep it

unoccupied till disposal of the suit. By an order dated 30.12.2000, the trial Court, after hearing the parties held that the respondent No.2 was guilt of disobedience of the order dated 9.3.94 and further ordered attachment of the said flat and directed recovery of possession of the suit flat from the petitioner and ordered the same to be retained in possession of the respondent No.2 till disposal of the suit. While attachment order continued, the respondent No.1 under an application under Section 151 of C.P.C. prayed for attachment of the flat by locking the same and keys thereof be maintained with the Court. The petitioner was not made a party to the said application. By an order dated 19.8.02, the Court directed the respondent No.2 to ensure that the petitioner vacates the suit flat and gives possession thereof to the bailiff of the Court and thereafter, the suit flat to be locked and sealed with one key to be retained with the respondent No.2 and another key to be deposited with the Nazir of the Court. Aggrieved by both these orders, namely Order dated 30.12.2000 ordering attachment and further order dated 19.8.2002, confirming the attachment in the form of sealing of the flat with one key of the lock being retained by the respondent No.2 and one key being deposited with the Nazir, the petitioner has filed the present petition.

3. The learned Counsel appearing for the petitioner while drawing attention to the decision of ***Nawal Kishore Singh and ors. V. Rajendra Prasad Singh and ors.*** reported in AIR 1976 Patna 561 and drawing attention to Rule 2-A, Order 39 C.P.C. submitted that the subject-matter of the suit for specific performance cannot be allowed to be attached in exercise of power under the said rules as it will it will result in disappearance of the entire substratum of the suit itself and the suit shall be rendered infructuous. Rule 2-A of Order 39 of C.P.C. reads thus :

> **"2-A. Consequence of disobedience or breach of injunction. –** (1) In the case of disobedience of any injunction granted or other order made under rule 1 or rule 2 or breach of any of the terms on which the injunction was granted or the order made, the Court granting the injunction or making the order, or any Court to which the suit or proceeding is transferred, may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in the civil prison for a term not exceeding three months, unless in the meantime the Court directs his release.
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> (2) No attachment made under this rule shall remain in force for more than one year, at the end of which time, if the disobedience or breach continues, the property attached may be sold and out of the proceeds, the Court may award such compensation

as it thinks fit to the injured party and shall pay the balance, if any, to the party entitled thereto."

4. The object behind the above rule is apparently to provide for consequences for the breach of the order of injunction issued by the Civil Court. It not only empowers the Civil Court to punish the person found to be guilty of disobedience or breach of the order of injunction issued by the court, but it also empowers the Court to attach the property of the person guilty of such disobedience or breach of the order. It further empowers the Court to sell the property attached if the disobedience continues.

5. The petitioner herein claims to have acquired the possession of the suit flat consequent to the Agreement dated 15.1.94, stated to have been entered into with the respondent No.2. The order dated 30.12.2000 clearly discloses a finding arrived at on the basis of the detailed analysis of the materials placed on record that the respondent No.2 had delivered possession of the suit flat to the petitioner after order dated 9.3.94. The petitioner and the respondent No.2 have not been able to prove that possession of the suit flat was delivered to the petitioner in the month of February, 1994 as was claimed by them. The petitioner has not been able to establish that the said findings are either perverse or not borne out from the record. Obviously, therefore, the induction of the petitioner

in the suit flat was after the order of injunction dated 9.3.1994. Undisputedly, under Order dated 9.3.1994, the respondent No.2 was restrained from creating any third party interest in the suit flat or parting with the possession thereof. The possession of the petitioner, therefore, after 9.3.94 was *ab initio* bad in law and did not cerate any right in favour of the petitioner in relation to the suit flat, nor the petitioner was entitled to be in possession of the suit flat. Besides, as on today, undisputedly, consequent to the impugned order, the petitioner has already vacated the suit flat. Considering these facts, therefore, the petitioner has not been able to point out any lawful interest in the suit flat, so as to raise the point which is sought to be raised in this petition by the petitioner. In the absence of the petitioner disclosing any interest in the suit flat, the question of the petitioner being entitled to raise the point that the suit flat could not be attached or sold in the proceedings under Order 39, Rule 2-A of C.P.C. as it would defeat the suit for specific performance, does not arise at all. The petitioner is not entitled to raise the issue and on that count itself, the petition is liable to be dismissed.

6. The suit for specific performance has been filed by the respondent No.1. Whether order in question directing the attachment and/or sale of the suit flat would render the suit to be

infructuous or not cannot be raised by a stranger to the suit. It will be entirely for the parties to raise such an issue, if they so desire.

7. It was sought to be contended that the right of the petitioner to continue to occupy the suit flat consequent to the agreement entered into between the petitioner and the respondent No.2 would depend upon the fate of the suit filed by the respondent No.1. The contention is totally devoid of any substance. Undisputedly, the petitioner was inducted in the suit flat subsequent to the order of temporary injunction passed by the trial Court. Being so, the interest, if any, which was sought to be created in favour of the petitioner in relation to the suit flat by the respondent No.2 was in contravention of the order of injunction and when the respondent No.2 was not entitled to create any such interest. Once it is clearly established that the respondent No.2 had no authority or power to create any interest in favour of any person, including the petitioner, any such person cannot acquire any right in the suit flat merely because he was inducted in the suit flat by the respondent No.2. Even assuming that there was an agreement between the petitioner and the respondent No.2 earlier to the attachment of which specific performance is sought for, it would not entitle the petitioner to continue in possession of the suit flat in view of the said injunction order. The possession of the suit flat having been acquired in

violation of the order of injunction, the same cannot have any protection in the eyes of law. Therefore, that being *ab initio* bad in law, such a possession cannot create any right in favour of the petitioner in relation to the suit flat. For the same reasons, therefore, the petitioner is not entitled to raise the issue which is sought to be raised in this petition.

8. The Patna High Court in ***Nawal Kishore Singh's case (supra)*** and in particular paragraph 6 of the decision, to which attention was drawn has held that in order to issue the order of attachment of the property it should be of the defendant and that the facts which were on record were not sufficient to disclose that the property was belonging to the person who was found to be guilty of disobedience of the order of injunction. Obviously, the observations were in peculiar facts of the case where the facts on record were not sufficient to reveal as to whether the property which was sought to be attached belonged to the person found guilty of disobedience of Court's order. This observation is of no help to the petitioner in the case in hand, as the petitioner has failed to make out any case of lawful interest in his favour in respect of the suit flat, which is sought to be attached.

9. In any case, the orders impugned are merely for attachment and not for sale of the suit flat.

10. For the reasons stated above, therefore, there is no case for interference in the impugned orders in writ jurisdiction on the ground canvassed by the petitioner. As no other ground is canvassed against the impugned orders, the petition fails and is, hereby, dismissed. Rule is discharged. No order as to costs.

R.M.S. KHANDEPARKAR, J.

Ssm.